

TAB 27

Page 308

[1] CAUSE NO. GV002327
[2] THE STATE OF TEXAS)IN THE DISTRICT COURT
ex rel.)
[3] VEN-A-CARE OF THE)
FLORIDA KEYS, INC.,)
[4] Plaintiffs,)
[5] VS.)TRAVIS COUNTY, TEXAS
[6] DEY, INC.; ROXANE)
LABORATORIES, INC.; WARRICK)
[7] PHARMACEUTICALS CORPORATION;)
SCHERING-PLOUGH CORPORATION;)
[8] SCHERING CORPORATION;)
LIPHA, S.A.; MERCK-LIPHA, S.A.;)
[9] MERCK, KGAA; AND EMD)
PHARMACEUTICALS, INC.,)
[10] Defendants.)53RD JUDICIAL DISTRICT
[11]

ORAL AND VIDEOTAPED DEPOSITION OF

[12] JUDY WATERER
[13] VOLUME II
APRIL 1ST, 2003

[14]
[15] ORAL AND VIDEOTAPED DEPOSITION OF
[16] JUDY WATERER, produced as a witness at the instance of
[17] the State of Texas and duly sworn, was taken in the
[18] above-styled and numbered cause on the 1st of April,
[19] 2003, from 9:06 a.m. to 6:10 p.m., before
[20] Debra L. Sietsma, CSR in and for the State of Texas,
[21] reported by machine shorthand, at the offices of
[22] Vorys, Sater, Seymour & Pease, L.L.P., 2100 One
[23] Cleveland Center, Cleveland, Ohio, pursuant to the
[24] Texas Rules of Civil Procedure and the provisions as
[25] previously set forth.

Page 309

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FOR DEFENDANTS WARRICK PHARMACEUTICALS CORPORATION,

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1) A: To me, when I hear "Medicaid," what comes to
 2) my mind is Medicaid rebate. That's — that's the
 3) relationship our company has with Medicaid.
 4) Q: Do you recall approximately when Roxane began
 5) considering doing an across-the-board WAC decrease on
 6) dozens of SKUs?
 7) A: I know we did it. We did a small subset
 8) first and then the whole rest of it. I don't remember
 9) the specific time frame.
 10) (Exhibit 855 marked).
 11) Q: (BY MR. ANDERSON) Ms. Waterer, I'm going to
 2) hand you what's been marked as Deposition Exhibit 855,
 3) ROX-TX-14599 sequentially through 14608. It's a
 4) composite exhibit, and it was produced by Roxane in
 5) this litigation.
 6) Steve, you're welcome to take a look at
 7) it, if you want.
 8) MR. MCCONNICO: Thank you.
 9) MR. ANDERSON: I've highlighted some
 10) portions of it.
 11) MR. MCCONNICO: Thank you.
 2) MR. ANDERSON: Sure.
 3) Q: (BY MR. ANDERSON) You're welcome to review
 4) the entire exhibit, Ms. Waterer.
 5) A: Thank you.

1) Q: My first question is: This document has a
 2) cover letter dated March 13th of 1998; is that
 3) correct?
 4) A: Yes.
 5) Q: And the first bullet point is "WAC/AWP
 6) Changes." Is that correct?
 7) A: Correct.
 8) Q: And then attached to the letter is a listing
 9) of — of all of Roxane's drugs and the new AWP, the
 10) new WAC, the old AWP and the old WAC. Is that
 11) correct?
 2) A: Yes. I — I think it's all of the products.
 3) I don't know if there were a couple left off the
 4) change.
 5) Q: All right. But you don't have any reason to
 6) think that there were any products left off here, do
 7) you?
 8) A: I — I really don't remember.
 9) Q: Okay.
 10) A: I don't know if that's the whole list or just
 11) the ones that were changed. I know it's the ones that
 2) were changed.
 3) Q: But there are some on here that didn't change
 4) at all, correct?
 5) A: I didn't see it —

1) Q: You haven't had a chance to —
 2) A: — in that much detail but —
 3) Q: Okay. Well, we're going to get into that;
 4) and we may point out a few that didn't change at all.
 5) Now, that's dated March 13th of '98; and
 6) that's when the WAC decrease and the AWP changes were
 7) implemented, correct?
 8) A: Yes.
 9) Q: And that was not only sent to Roxane's
 10) customers, but that was sent to the pricing services?
 11) A: Yes.
 12) Q: Was this sent to First DataBank?
 13) A: Rich would have sent it. He was doing all
 14) the communications with First DataBank at that point.
 15) It would have been his responsibility to send it. I
 16) would have to assume that he did send it.
 17) Q: Well, since in December of '97 Roxane had
 18) chose to no longer publish WAC prices to First
 19) DataBank, would Roxane have sent those new WACs?
 20) A: They would have sent just the AWP's then.
 21) Q: Right. Just the AWP's?
 22) A: Correct.
 23) Q: Okay.
 24) A: I believe so.
 25) Q: Now, I also would like to point your

1) attention to Tupa Exhibit 652; and this was a two-page
 2) exhibit, ROX-TX-01264 and 1265.
 3) Steve?
 4) MR. MCCONNICO: No.
 5) Q: (BY MR. ANDERSON) Okay. This was used in
 6) the deposition of Mr. Tupa, your former boss; and it's
 7) written by you to Mr. Gerstenberg, and you copied
 8) Mr. Tupa. It's dated February 7th, '98 —
 9) A: Okay.
 10) Q: — titled "WAC Adjustment Implementation
 11) Update." If you could, take a look at that, and then
 12) I'll have some questions about that as well.
 13) Do you recall roughly when Roxane
 14) started analyzing whether or not they should do a WAC
 15) adjustment?
 16) A: When they started, no.
 17) Q: Would it have been several months prior to
 18) February 7th of '98?
 19) A: I believe — I — I believe it's even
 20) referred to in here. We did something that we called
 21) baby WAC and big WAC; and baby WAC was run the year
 22) before we implemented the big WAC, as a trial balloon.
 23) If big WAC happened in '98, baby WAC would have been
 24) third or fourth quarter '97.
 25) Q: And when you say "baby WAC," are you

A: Uh-huh.

Q: Wouldn't it be appropriate on this generic drug, hydrochlorothiazide, for a Medicaid program to base reimbursement on a WAC there?

MR. MCDONALD: Object to the form.

THE WITNESS: It's — one could argue whether it's a generic drug.

Q: (BY MR. ANDERSON) Okay. Well, is that the WAC that's being charged in the marketplace?

A: WAC is the price that wholesalers buy every one of our products for.

Q: And you've raised the WAC on that product because the market prices have gone up, correct?

A: We've raised the price on that product, it looks like, probably by consumer price index, because it's like a brand product.

Q: And if a Medicaid program didn't pay off of WAC on that product, would your customers be upset?

MR. MCDONALD: Object to the form.

THE WITNESS: I — I don't know what would or wouldn't upset them if they didn't base it on WAC and based it on something else that made sense. I don't think anybody would object. I don't know. I — I don't — I — I didn't set this up. It was in existence before I think generics even began.

Q: (BY MR. ANDERSON) When you were at Roxane, you controlled the AWP and the WAC prices, correct?

MR. MCCONNICO: Objection, form.

THE WITNESS: I had influence over them.

Q: (BY MR. ANDERSON) You set those prices; and then ultimately Ed Tupa authorized the publishing of those prices, correct?

A: I instituted changes to the prices, and on new-launch products I set them; but I did not create the pricing that was there prior to me getting there.

Q: Well, that's a good point. And, for instance, we had questioning today about hydromorphone.

When you got to Roxane, you raised the AWP on that generic product, didn't you?

A: Yes.

Q: And that went out and Medicaid's reimbursed based upon that increased AWP?

A: I brought the AWP into standard with everybody else so that we not — were not getting discriminated against in purchasing decisions. Did I go out and set a new price that was designed to impact the reimbursement on a program I didn't know existed to influence a buying decision, no. I just leveled the playing field. I tried to take away a

(1) disadvantage because analysis said that was causing
(2) it. Apparently the systems that were in place were
(3) forcing us to be disadvantaged.

(4) Q: When you lowered the WAC on the haloperidol
(5) product from \$450 to \$33, did you notify the Medicaid's
(6) of that decrease?

(7) A: I don't notify Medicaid of anything.

(8) Q: Did you notify First DataBank of that
(9) decrease?

(10) A: We don't report WACs to First DataBank.

(11) Q: Did you report to First DataBank the increase
(12) in AWP?

(13) A: We report AWP's, whether they go up or down or
(14) stay the same, to First DataBank.

(15) Q: Well, that's a good point.

(16) If you could, do you know whether or not
(17) a single AWP of all these drugs listed in 855 went
(18) down?

(19) A: No.

(20) Q: Not a single one?

(21) A: I don't know. I'd have to go through and
(22) look at it.

(23) Q: But, yet, several went up, didn't they?

(24) A: On the brand products they went up. I don't
(25) know if any went down. I'd have to study it.

(1) Q: Well, take your time. Flip through that and
(2) tell me if any of those AWP's went down.

(3) A: There's nine pages. I'm on Page 6. I
(4) haven't found one; so if any did, it would have been
(5) very few.

(6) Q: All right. Now, earlier I mentioned briefly
(7) if you knew a gentleman named Jim Rowenhorst; is that
(8) right?

(9) A: Yes.

(10) Q: And your — your response was that you had
(11) heard the name but you couldn't —

(12) A: I probably met him; but he's not somebody
(13) that I know well enough that, if I saw him again, I'd
(14) be "There's Jim."

(15) Q: All right.

(16) A: He would be familiar to me.

(17) Q: Have you reviewed some documents recently
(18) pertaining to communications you had with
(19) Mr. Rowenhorst?

(20) A: I don't think so, no.

(21) Q: Have you reviewed any documents recently that
(22) pertained to the WAC and AWP changes implemented in
(23) March of '98?

(24) A: I don't think so. I don't recall.

(25) Q: If I could, I'd like you to take a look at

Page 580

with it?" I wouldn't have seen the proposal.

Q: Would the spreadsheet that you would have reviewed also had competitors' competing offers on a product as well as their AWP?

A: Currently — well, we've had so many different ways of doing it.

Oh, I'm sorry.

I don't know if it would be on the spreadsheet; but we would try to have that information so we could understand where the market was set, figuring we'd have to meet or beat that to be competitive.

Q: In making that analysis as to how to be competitive, would you analyze your competitors' bid prices?

A: Yes.

Q: In making that analysis as to how to be competitive, would you analyze your competitors' AWP's?

A: No.

Q: Then how would you go about addressing GeriMed's concern that there be a increased revenue through a better spread?

A: I think that's their issue in their decision-making. I never saw that. I just agree or — I — I would approve or disapprove pricing and

Page 581

terms on the bid.

Q: Other than the marketing department, was there any other department at Roxane that controlled the setting and publication of AWP pricing?

A: Over time — let me think.

For the duration of time that I was there, the responsibility very quickly shifted to me. The publication of it — contracts handled some kinds of notifications, and Rich Feldman handled some kinds of reporting. Over time it varied.

Q: Other than the marketing department, were there other departments at Roxane that controlled the setting and publication of WAC pricing?

A: I think that would be the same answer.

Q: Now, if I could, I'll — I'll draw your attention to page ROX-TX-04066, which also is part of Exhibit 251, and I'll read this for the benefit of the jury.

"Reimbursement Assistance. The GeriMed binder and emphasis system provide item-by-item detailed printouts and screens with the state MACs and calculations per state. The GeriMed program identifies the lowest-cost product and the best spread for the particular state."

Did I read that correctly?

Page 582

[1] A: Yes.

[2] Q: Would you have had any involvement in
[3] addressing GeriMed's concerns regarding the best
[4] spread in that context?

[5] A: It sounds to me like GeriMed was providing
[6] this information to their own members, so no. I don't
[7] recall even ever seeing this document, so I couldn't
[8] have done anything to respond to it.

[9] Q: Are you aware that in the generic industry,
[10] and the brand industry, for that matter, that GeriMed
[11] would provide information such as the difference
[12] between AWP and cost to its members?

[13] A: No.

[14] Q: Are you aware that in the pharmaceutical
[15] industry that wholesalers would provide information to
[16] their pharmacy customers regarding the spread between
[17] AWP and cost on pharmaceuticals?

[18] MR. MCDONALD: Object to the form.

[19] THE WITNESS: I know they published —
[20] or at least I used to know. When I was calling on
[21] them, I saw that they frequently published AWP's and
[22] they frequently published what their price in the
[23] catalog was going to be to the customer. I don't
[24] recall them ever putting an association between the
[25] two.

Page 583

[1] Q: (BY MR. ANDERSON) Have you ever seen or
[2] heard about software that major wholesalers offer to
[3] their customers?

[4] A: Wholesalers derive a significant portion of
[5] their earnings from software systems that they supply
[6] their customers, yes.

[7] Q: So you're aware that they are offering that
[8] type of service?

[9] A: I'm aware that they're offering software. My
[10] understanding of the software that — software that
[11] they were offering, as far as I understood it, was
[12] more efficient ways to order. I don't know — I have
[13] no knowledge of wholesalers supplying a software
[14] package that would tell a customer how to cherry-pick
[15] a product, so I don't know.

[16] Q: Have you — have you ever heard of the fact
[17] that softwares — strike that.

[18] Have you ever heard of the fact that
[19] wholesalers offer software to pharmacy customers that
[20] calculates the spread between AWP and cost on NDC
[21] numbers?

[22] A: I —

[23] MR. MCDONALD: Object to the form.

[24] MR. HAGENSWOLD: Object to form.

[25] THE WITNESS: I'm not really aware of